

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Dec 04, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH M.,

Plaintiff,

v.

MARTIN O'MALLEY,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

NO: 2:23-CV-00145-LRS

ORDER AFFIRMING THE
COMMISSIONER'S DECISION

BEFORE THE COURT are the parties' briefs.² ECF Nos. 9, 11. This matter was submitted for consideration without oral argument. Plaintiff is represented by

¹ Martin O'Malley became the Commissioner of Social Security on December 20, 2023. Pursuant to Rule 25(d) of the Rules of Civil Procedure, Martin O'Malley is substituted for Kilolo Kijakazi as the Defendant in this suit.

² Plaintiff's opening brief is labeled a Motion for Summary Judgment. ECF No. 9. The supplemental rules for Social Security actions under 42 U.S.C. § 405(g) went

1 attorney Chad Hatfield. Defendant is represented by Special Assistant United States
2 Attorney Ryan Lu. The Court, having reviewed the administrative record and the
3 parties' briefing, is fully informed. For the reasons discussed below, Plaintiff's
4 brief, ECF No. 9, is denied and Defendant's brief, ECF No. 11, is granted.

5 JURISDICTION

6 Joseph M.³ (Plaintiff) filed for disability insurance benefits and for
7 supplemental security income on August 9, 2018, alleging in both applications an
8 onset date of August 2, 2018. Tr. 209-16. Benefits were denied initially, Tr. 136-
9 44, and upon reconsideration, Tr. 148-61. Plaintiff appeared at a hearing before an
10 administrative law judge (ALJ) on June 10, 2020. Tr. 36-87. On July 10, 2020, the
11 ALJ issued an unfavorable decision, Tr. 12-32, and on October 7, 2020, the Appeals
12 Council denied review. Tr. 1-6. Plaintiff appealed to the United States District
13 Court for the Eastern District of Washington, and on February 15, 2022, pursuant to
14 the stipulation of the parties, the undersigned remanded the matter for further
15 proceedings.

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19 into effect on December 1, 2022; Rule 5 and Rule 6 state the actions are presented
20 as briefs rather than motions. Fed. R. Civ. P. Supp. Sec. R. 5, 6.

21 ³ The last initial of the claimant is used to protect privacy.

1 After a second hearing on February 23, 2023, Tr. 674-99, the ALJ issued a
2 second unfavorable decision on March 14, 2023. Tr. 642-73. The matter is now
3 before this Court pursuant to 42 U.S.C. § 405(g).

4 **BACKGROUND**

5 The facts of the case are set forth in the administrative hearing and transcripts,
6 the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are
7 therefore only summarized here.

8 Plaintiff was 36 years old on the alleged onset date. Tr. 661. He has work
9 experience as a heating and air conditioning servicer, an adult rehabilitation aide,
10 welder, auto parts clerk and runner, tire service and repair provider, casino buffet
11 supervisor, mini-mart clerk, and powder coater. Tr. 69-73. Plaintiff testified that his
12 major problem is ruptured discs in his lower back and herniated discs in his neck.
13 Tr. 42. He has pain in his right leg, lower back, middle back, shoulders, neck, and
14 arms. Tr. 43. He sometimes has difficulty standing straight due to lower back pain,
15 and his neck sometimes gets so tight that he has difficulty turning his head side to
16 side. Tr. 52. He gets tension headaches that turn into migraines. Tr. 52. His back
17 pain travels into his right leg and occasionally into his left leg. Tr. 53. On really
18 bad days he cannot do much more than sit or lie down. Tr. 56. He has bad days two
19 times per week on average. Tr. 56. He has pain and numbness in his arms and has
20 difficulty gripping and holding things with his hands. Tr. 61. At the second
21

1 hearing, Plaintiff testified that some of his pain and limitations had gotten worse.
2 Tr. 680-684.

3 STANDARD OF REVIEW

4 A district court's review of a final decision of the Commissioner of Social
5 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
6 limited; the Commissioner's decision will be disturbed "only if it is not supported by
7 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
8 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
9 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
10 citation omitted). Stated differently, substantial evidence equates to "more than a
11 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).
12 In determining whether the standard has been satisfied, a reviewing court must
13 consider the entire record as a whole rather than searching for supporting evidence in
14 isolation. *Id.*

15 In reviewing a denial of benefits, a district court may not substitute its
16 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
17 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one
18 rational interpretation, [the court] must uphold the ALJ's findings if they are
19 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
20 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's
21 decision on account of an error that is harmless." *Id.* An error is harmless "where it

1 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
2 (quotation and citation omitted). The party appealing the ALJ’s decision generally
3 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
4 396, 409-10 (2009).

5 **FIVE-STEP EVALUATION PROCESS**

6 A claimant must satisfy two conditions to be considered “disabled” within the
7 meaning of the Social Security Act. First, the claimant must be “unable to engage in
8 any substantial gainful activity by reason of any medically determinable physical or
9 mental impairment which can be expected to result in death or which has lasted or
10 can be expected to last for a continuous period of not less than twelve months.” 42
11 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must
12 be “of such severity that he is not only unable to do [his or her] previous work[,] but
13 cannot, considering [his or her] age, education, and work experience, engage in any
14 other kind of substantial gainful work which exists in the national economy.” 42
15 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

16 The Commissioner has established a five-step sequential analysis to determine
17 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-
18 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
19 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is
20 engaged in “substantial gainful activity,” the Commissioner must find that the
21 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
4 claimant suffers from "any impairment or combination of impairments which
5 significantly limits [his or her] physical or mental ability to do basic work
6 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
7 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
8 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
9 §§ 404.1520(c), 416.920(c).

10 At step three, the Commissioner compares the claimant's impairment to
11 severe impairments recognized by the Commissioner to be so severe as to preclude a
12 person from engaging in substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe
14 than one of the enumerated impairments, the Commissioner must find the claimant
15 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

16 If the severity of the claimant's impairment does not meet or exceed the
17 severity of the enumerated impairments, the Commissioner must pause to assess the
18 claimant's "residual functional capacity." Residual functional capacity (RFC),
19 defined generally as the claimant's ability to perform physical and mental work
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
21

1 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
2 analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in the
5 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
6 claimant is capable of performing past relevant work, the Commissioner must find
7 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the
8 claimant is incapable of performing such work, the analysis proceeds to step five.

9 At step five, the Commissioner should conclude whether, in view of the
10 claimant's RFC, the claimant is capable of performing other work in the national
11 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this
12 determination, the Commissioner must also consider vocational factors such as the
13 claimant's age, education, and past work experience. 20 C.F.R. §§
14 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other
15 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
16 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
17 work, analysis concludes with a finding that the claimant is disabled and is therefore
18 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

19 The claimant bears the burden of proof at steps one through four above.
20 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
21 step five, the burden shifts to the Commissioner to establish that (1) the claimant is

capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ’S FINDINGS

At step one, the ALJ found Plaintiff has not engaged in substantial gainful activity since August 2, 2018, the alleged onset date. Tr. 648. At step two, the ALJ found that Plaintiff has the following severe impairments: degenerative disc disease of the lumbar spine; mild degenerative disc disease of the cervical spine; headaches; and, as of 2/17/21, left ulnar neuropathy and right median mononeuropathy. Tr. 648.

At step three, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. Tr. 651. The ALJ then found that Plaintiff has the residual functional capacity to perform light work with the following additional limitations:

he could never climb ladders, ropes, or scaffolds, could never crawl, but could occasionally perform all other postural activities. He could frequently use a foot pedal with the left lower extremity and could occasionally reach overhead bilaterally. He should avoid concentrated exposure to extreme cold and vibration, and should avoid all exposures to hazards. As of February 17, 2021, the residual functional capacity assessment is as above with the addition of no repetitive, forceful grasping.

Tr. 652.

At step four, the ALJ found that before February 17, 2021, Plaintiff could perform past work as an assembler and cashier auto parts services. Tr. 661.

1 Alternatively, at step five, after considering and Plaintiff's age, education, work
2 experience, and residual functional capacity, the ALJ found that there are jobs that
3 exist in significant numbers in the national economy that Plaintiff can perform such
4 as collator operator, deliverer outside, and routing clerk. Tr. 661-62. Thus, the ALJ
5 determined that Plaintiff has not been under a disability as defined in the Social
6 Security Act from August 2, 2018, through the date of the decision. Tr. 663.

7 ISSUES

8 Plaintiff seeks judicial review of the Commissioner's final decision denying
9 disability income benefits under Title II and supplemental security income under
10 Title XVI of the Social Security Act. ECF No. 9. Plaintiff raises the following
11 issues for review:

- 12 1. Whether the ALJ properly considered the medical opinion evidence;
- 13 2. Whether the ALJ properly considered Plaintiff's impairments at step two;
- 14 3. Whether the ALJ properly considered Plaintiff's subjective complaints;
- 15 and
- 16 4. Whether the ALJ properly considered step four and step five.

17 ECF No. 9 at 8.

18 DISCUSSION

19 A. Medical Opinions

20 For claims filed on or after March 27, 2017, the regulations provide that the
21 ALJ will no longer "give any specific evidentiary weight...to any medical

1 opinion(s)..." *Revisions to Rules Regarding the Evaluation of Medical Evidence*,
2 2017 WL 168819, 82 Fed. Reg. 5867-88 (Jan. 18, 2017); 20 C.F.R. §
3 404.1520c. Instead, an ALJ must consider and evaluate the persuasiveness of all
4 medical opinions or prior administrative medical findings from medical sources.
5 20 C.F.R. § 404.1520c(a) and (b). Supportability and consistency are the most
6 important factors in evaluating the persuasiveness of medical opinions and prior
7 administrative findings, and therefore the ALJ is required to explain how both
8 factors were considered. 20 C.F.R. § 404.1520c(b)(2). The ALJ may, but is not
9 required, to explain how other factors were considered. 20 C.F.R. §
10 404.1520c(b)(2); *see* 20 C.F.R. § 404.1520c(c)(1)-(5).

11 *1. Inda Hertz, PA-C*

12 In March 2022, PA-C Hertz completed a physical disability evaluation. Tr.
13 1696-1706. She listed diagnoses of lumbar degenerative disk disease, right lumbar
14 radiculopathy, cervical degenerative disk disease, left cervical radiculopathy, chronic
15 neck and lower back pain, right carpal tunnel syndrome/chronic right-hand
16 numbness and weakness. Tr. 1704. PA-C Hertz opined that Plaintiff is limited to
17 standing/walking two to four hours per day cumulative, 60-90 minutes at a time;
18 frequent balancing, climbing ladders, and climbing stairs; frequent use of foot
19 controls; lifting/carrying 21-50 pounds occasionally and 15-20 pounds frequently;
20 frequent push/pull; frequent reaching waist to shoulder; frequent reaching above
21

1 shoulder; continuous gross and fine manipulation; continuous environmental
2 exposures except frequent unprotected heights. Tr. 1705-06.

3 The ALJ found the opinion of PA-C Hertz to be “generally persuasive.” Tr.
4 660. Plaintiff argues that despite finding PA-C Hertz’s opinion is persuasive, the
5 ALJ failed to properly translate her findings to the RFC finding. ECF No. 9 at 11.
6 Plaintiff argues that the limitation of cumulative sitting and standing of two to four
7 hours per day assessed by PA-C Hertz is inconsistent with the RFC finding of light
8 work. ECF No. 9 at 11.

9 With regard to supportability, the ALJ found the opinion is well-supported by
10 the consultative exam. Tr. 660. The more relevant the objective medical evidence
11 and supporting explanations provided by a medical source to support his or her
12 opinion, the more persuasive the medical opinion will be. 20 C.F.R. §§
13 404.1520c(c), 416.920c(c). With regard to consistency, however, the ALJ found
14 certain limitations assessed by PA-C Hertz to be inconsistent with the record. Tr.
15 660. The more consistent a medical opinion is with the evidence from other medical
16 sources and nonmedical sources in the claim, the more persuasive the medical
17 opinion will be. 20 C.F.R. §§ 404.1520c(c), 416.920c(c). The ALJ found the
18 standing and walking limitation assessed by PA-C Hertz is inconsistent with the
19 record which shows a generally normal gait, tandem gait, and toe and heel walking.
20 Tr. 660 (citing Tr. 429, 449, 458, 468, 540, 543, 555, 564, 572-73, 636, 1031, 1517,
21 1699, 1998, 2036). The ALJ also found that the limitations on bilateral foot control

1 use and reaching are inconsistent with the record. Tr. 660 (numerous citations). The
2 ALJ rejected the sitting and standing limitation based on a legally sufficient reason
3 supported by substantial evidence. Contrary to Plaintiff's argument, the ALJ is not
4 required to incorporate evidence from discounted medical opinions into the RFC.
5 *Batson*, 359 F.3d at 1197. There is no error regarding PA-C Hertz's opinion.

6 2. *Henry Urbaniak, M.D.*

7 Dr. Urbaniak testified as the medical expert at the first hearing in June 2020.
8 Tr. 43-50. He observed that Plaintiff's main issues are neck, arm, low back, and leg
9 pain. Tr. 43-44. Dr. Urbaniak noted an MRI showed a herniated disc at L4-5 with
10 some restrictions of lumbosacral motion which is consistent with low back and leg
11 pain. Tr. 43. He noted that much of the testing of Plaintiff's lower extremities was
12 within normal limits. Tr. 43. Dr. Urbaniak opined that Plaintiff's impairments do
13 not meet or equal a listing, and that reasonable limitations include lifting and
14 carrying 20 pounds occasionally and 10 pounds frequently; no ladders, ropes, or
15 scaffolds; limited climbing stairs, ramps, and ladders; limited crawling, stooping,
16 and crouching; and no unprotected heights. Tr. 46-47.

17 The ALJ found Dr. Urbaniak's opinion is very persuasive. Tr. 657. With
18 regard to supportability, the ALJ found Dr. Urbaniak's opinion is supported by the
19 findings he cited in his testimony. Tr. 657. With regard to consistency, the ALJ
20 found his opinion is generally consistent with the medical record, including findings
21 of generally normal gait, tandem gait, motor strength, grip strength, sensation,

1 monofilament foot sensation, reflexes, often normal range of upper and lower
2 extremity range of motion; lumbar and cervical range of motion, and mild findings
3 on imaging. Tr. 657-58 (numerous citations).

4 Plaintiff argues the ALJ erred by relying on Dr. Urbaniak's testimony
5 because, according to Plaintiff, Dr. Urbaniak "admitted that he did not adequately
6 review the record in failing to identify the electrodiagnostic evidence of cervical
7 radiculopathy." ECF No. 9 at 12 (citing Tr. 47-48). This argument fails for several
8 reasons.

9 First, Plaintiff's argument is not an accurate characterization of Dr.
10 Urbaniak's testimony. At the hearing, Plaintiff's counsel asked Dr. Urbaniak about
11 page 14 of exhibit 12F. Tr. 47-48. The exhibit noted a cervical MRI dated
12 September 6, 2019, indicating a disc bulge at C5-6, and EMG findings from July 26,
13 2019, showing acute cervical radiculopathy. Tr. 505. Dr. Urbaniak said he "must
14 have missed the notes on the cervical EMG." Tr. 48. Counsel directed Dr. Urbaniak
15 to the exhibit and said, "the EMG showed an acute C6 radiculopathy with active
16 denervation –denervation, and they also noted some small nerve root discs at
17 [various] levels." Tr. 49. Counsel asked if the MRI and EMG findings are
18 "consistent with his complaints of having neck pain that goes through the shoulder
19 down in – into hand?" Tr. 49. Dr. Urbaniak replied said "[y]es, it is." Tr. 49.
20 Counsel asked if notes from the same exhibit indicating three out of five strength,
21 three out of five grip, and three out of five range of motion are related to the same

1 neck impairment. Tr. 49. Dr. Urbaniak replied, “I think it’d be related to the neck
2 issues.” Tr. 49. Thus, Dr. Urbaniak did not “admit” an inadequate review of the
3 record, he said only that he did not make a note of a cervical EMG, and no questions
4 were posed about the EMG that he was unable to answer. This does not reasonably
5 undermine his testimony or reduce his credibility as an expert witness.

6 Furthermore, after Dr. Urbaniak testified, the ALJ pointed out to counsel that
7 page 14 of exhibit 12F is an office visit record which includes the provider’s
8 summary of the 2019 MRI and EMG but not the actual MRI and EMG reports. Tr.
9 50. The ALJ noted that counsel did not accurately read the provider’s summary of
10 the EMG to Dr. Urbaniak. Tr. 50. The ALJ noted:

11 My -- my concern about that is because what you were saying to the
12 doctor is not exactly what is reported in this review of the EMG. It
13 says that he had denervation to the left bicep and to the cervical
14 paraspinal muscles, but it says that no evidence of sensory motor
15 myopathy entrapment, mononeuropathy or polyneuropathy is found in
16 the upper extremities. In other words, he had problems with his upper
back and into his shoulder area, but there was nothing going down his
arm into his hands. So that’s why I wanted to see the actual EMG to
see if it says something different from what this summary says.
Because this summary doesn’t – isn’t copasetic with [what] you were
asking the doctor.

17 Tr. 50-51. Counsel then said, “Oh, yes, I just said denervation. I didn’t even say
18 where, yeah.” Tr. 51. Thus, this portion of Dr. Urbaniak’s testimony is based on
19 counsel’s inaccurate or incomplete reading of the record and which suggested
20 greater impairment than the record actually indicates. Even so, Dr. Urbaniak did not
21 identify any additional limitations due to counsel’s statement of the EMG results.

1 Additionally, the ALJ’s decision noted counsel’s question regarding the EMG
2 results, but pointed out the exhibit is only a summary by a physician assistant and
3 does not contain the objective results of the MRI and EMG. Tr. 657. The actual
4 EMG report does not appear to be part of the record.⁴ Tr. 51. Ultimately, Dr.
5 Urbaniak’s testimony regarding a record summarizing the EMG does not appear to
6 impact the RFC finding. The ALJ’s consideration of the EMG testimony was
7 reasonable and supported by the record.

8 Furthermore, even if Dr. Urbaniak overlooked a significant piece of evidence
9 (and the Court does not so find), Plaintiff identifies no authority indicating remand is
10 appropriate on this basis. ECF No. 9 at 12. The RFC determination is an
11 administrative finding reserved to the Commissioner. *See* 20 C.F.R. §§ 404.1527(d);
12 416.927(d); *Dominguez v. Colvin*, 808 F.3d 403, 409 (9th Cir. 2015); *Vertigan v.*
13 *Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001) (“It is clear that it is the responsibility
14 of the ALJ, not the claimant’s physician, to determine [RFC].”). In addition to Dr.
15 Urbaniak’s opinion, the ALJ considered other medical opinions, Plaintiff’s symptom
16 allegations, and the rest of the record in formulating the RFC. Tr. 652-61. Plaintiff
17 has not established any error.

18 **B. Step Two**

19 ⁴ The 2019 cervical MRI is part of the record and was considered by the ALJ. Tr.
20 654 (citing Tr. 518).
21

1 At step two of the sequential process, the ALJ must determine whether there is
2 a medically determinable impairment established by objective medical evidence
3 from an acceptable medical source. 20 C.F.R. §§ 404.1521, 416.921. A statement
4 of symptoms, a diagnosis, or a medical opinion does not establish the existence of an
5 impairment. *Id.* After a medically determinable impairment is established, the ALJ
6 must determine whether the impairment is “severe;” i.e., one that significantly limits
7 his or her physical or mental ability to do basic work activities. 20 C.F.R. §§
8 404.1520(c), 416.920(c). However, the fact that a medically determinable condition
9 exists does not automatically mean the symptoms are “severe” or “disabling” as
10 defined by the Social Security regulations. *See e.g. Edlund*, 253 F.3d at 1159-60;
11 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545,
12 1549-50 (9th Cir. 1985).

13 To establish a severe impairment, the claimant must first demonstrate that the
14 impairment results from anatomical, physiological, or psychological abnormalities
15 that can be shown by medically acceptable clinical or laboratory diagnostic
16 techniques. 20 C.F.R. §§ 404.1521, 416.921. In other words, the claimant must
17 establish the existence of the physical or mental impairment through objective
18 medical evidence (*i.e.*, signs, laboratory findings, or both) from an acceptable
19 medical source; the medical impairment cannot be established by the claimant's
20 statement of symptoms, a diagnosis, or a medical opinion. *Id.*

1 An impairment may be found to be not severe when “medical evidence
2 establishes only a slight abnormality or a combination of slight abnormalities which
3 would have no more than a minimal effect on an individual’s ability to work.” Social
4 Security Ruling (SSR) 85-28 at *3. Similarly, an impairment is not severe if it does
5 not significantly limit a claimant's physical or mental ability to do basic work
6 activities; which include walking, standing, sitting, lifting, pushing, pulling,
7 reaching, carrying, or handling; seeing, hearing, and speaking; understanding,
8 carrying out and remembering simple instructions; use of judgment, responding
9 appropriately to supervision, coworkers and usual work situations; and dealing with
10 changes in a routine work setting. 20 C.F.R. §§ 404.1522(a), 416.922(a); SSR 85-28.

11 Step two is not meant to identify the impairments that should be considered
12 when determining the RFC. *Buck v. Berryhill*, 869 F.3d 1040, 1048–49 (9th Cir.
13 2017). In fact, “[i]n assessing RFC, the adjudicator must consider limitations and
14 restrictions imposed by all of an individual's impairments, even those that are not
15 ‘severe.’” Social Security Ruling (S.S.R.) 96-8p, 1996 WL 374184, at *5 (July 2,
16 1996); Thus, the ALJ must consider the effect of all impairments, including
17 medically determinable but non-severe impairments, in evaluating the RFC. 20
18 C.F.R. §§ 404.1545(a)(2), 416.945(a)(2).

19 At step two, the ALJ found Plaintiff has severe impairments of degenerative
20 disc disease of the lumbar spine, mild degenerative disc disease of the cervical
21 spine, headaches, and, as of February 17, 2021, left ulnar neuropathy and right

1 median mononeuropathy. Tr. 648. Plaintiff contends the ALJ should have found
2 additional severe impairments of lumbar radiculopathy, cervical radiculopathy,
3 carpal tunnel syndrome, and cubital tunnel syndrome. ECF No. 9 at 13.

4 First, the severe impairment of mononeuropathy includes carpal tunnel
5 syndrome (mononeuropathy across the wrist) and cubital tunnel syndrome
6 (mononeuropathy across the wrist or elbow). *See e.g., Diane S. V. v. Kijakazi*, 2023
7 WL 3801946, No. 22-cv-06385-SK (N.D. Cal. June 2, 2023). Thus, the ALJ did not
8 err by not naming carpal tunnel or cubital tunnel syndrome as severe impairments.

9 Second, with regard to radiculopathy, Defendant argues that Plaintiff's
10 position is without merit because radiculopathy is a symptom, not an impairment,
11 and symptoms are not impairments within the meaning of the regulations. ECF No.
12 11 at 14 (citing *e.g., Kyoung-Taei Kim and Young-Baeg Kim, Cervical*
13 *Radiculopathy due to Cervical Degenerative Diseases: Anatomy, Diagnosis and*
14 *Treatment*, J. Korean Neuro. Soc., at 473-79, December 31, 2010,
15 <https://pmc.ncbi.nlm.nih.gov/articles/PMC3053539/>). Plaintiff notes at least one
16 instance where radiculopathy is listed as a diagnosis in the record, ECF No. 9 at 14,
17 and alleges it requires him to lie down throughout the day to relieve pain. However,
18 a diagnosis alone does not establish the severity of an impairment. *See Key v.*
19 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

20 Regardless, even if the ALJ should have found one of these conditions to be
21 a severe impairment, any error would be harmless. When an ALJ fails to identify a

1 severe impairment at step two, but nonetheless considers at subsequent steps all of
2 the claimant's impairments, including the erroneously omitted severe impairment,
3 the error at step two is harmless. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir.
4 2007); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). Here, the ALJ
5 considered all of Plaintiff's impairments at the subsequent steps of the sequential
6 analysis and in his summary of the medical evidence. Tr. 651-62.

7 At step three, the ALJ considered the listing relevant to radiculopathy by
8 considering Listing 1.15 for disorders of the skeletal spine resulting in compromise
9 of a nerve root and the listing relevant to carpal tunnel and cubital tunnel syndrome
10 by considering Listing 11.14 for peripheral neuropathy. At step four, the ALJ also
11 considered many of the records referenced by Plaintiff regarding symptoms related
12 to carpal tunnel syndrome, cubital tunnel syndrome, and radiculopathy. Tr. 655-56
13 (citing *e.g.*, Tr. 475, 496-97, 400, 505, 1055-56). The ALJ acknowledged the nerve
14 conduction study in February 2019 showed mild chronic right S1 lumbar
15 polyradiculopathy with evidence of reinnervation only and no acute denervation. Tr.
16 654, 475. However, the ALJ also noted a nerve conduction test of the lower
17 extremities in February 2022 was normal, without evidence of lumbar radiculopathy.
18 Tr. 654, 1052; *see also* Tr. 1995 (2/24/20 electrodiagnostic studies of the lower
19 extremities were normal without evidence of myopathy, radiculopathy, or peripheral
20 polyneuropathy). The ALJ included limitations in the RFC resulting from
21 Plaintiff's degenerative disc disease of the lumbar and cervical spine. Tr. 652-54.

1 Furthermore, the ALJ included limitations in the RFC as of February 17, 2021,
2 resulting from Plaintiff's left ulnar neuropathy and right median mononeuropathy,
3 based on the same records cited by Plaintiff. Tr. 652, 656.

4 The ALJ considered Plaintiff's radiculopathy, carpal tunnel syndrome, and
5 cubital tunnel syndrome throughout the decision. Thus, even assuming the ALJ
6 erred at step two, that error would have been harmless. *Lewis*, 498 F.3d at 911; *see*
7 *also Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (the party appealing the
8 ALJ's decision bears the burden of establishing harm).

9 **C. Symptom Testimony**

10 An ALJ engages in a two-step analysis to determine whether to discount a
11 claimant's testimony regarding subjective symptoms. Social Security Ruling
12 (SSR) 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether
13 there is objective medical evidence of an underlying impairment which could
14 reasonably be expected to produce the pain or other symptoms alleged." *Molina*,
15 674 F.3d at 1112 (quotation marks omitted). "The claimant is not required to show
16 that [the claimant's] impairment could reasonably be expected to cause the severity
17 of the symptom [the claimant] has alleged; [the claimant] need only show that it
18 could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*,
19 572 F.3d 586, 591 (9th Cir. 2009).

20 Second, "[i]f the claimant meets the first test and there is no evidence of
21 malingering, the ALJ can only reject the claimant's testimony about the severity of

1 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
2 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
3 omitted). General findings are insufficient; rather, the ALJ must identify what
4 symptom claims are being discounted and what evidence undermines these claims.
5 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
6 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
7 explain why it discounted claimant's symptom claims)).

8 “The clear and convincing [evidence] standard is the most demanding
9 required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir.
10 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.
11 2002)). Factors to be considered in evaluating the intensity, persistence, and
12 limiting effects of a claimant's symptoms include: 1) daily activities; 2) the location,
13 duration, frequency, and intensity of pain or other symptoms; 3) factors that
14 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and side
15 effects of any medication an individual takes or has taken to alleviate pain or other
16 symptoms; 5) treatment, other than medication, an individual receives or has
17 received for relief of pain or other symptoms; 6) any measures other than treatment
18 an individual uses or has used to relieve pain or other symptoms; and 7) any other
19 factors concerning an individual's functional limitations and restrictions due to pain
20 or other symptoms. 2017 WL 5180304, at *9 (effective October 25, 2017); 20
21 C.F.R. §§ 404.1529(c), 416.929(c). The ALJ is instructed to “consider all of the

1 evidence in an individual's record,” to “determine how symptoms limit ability to
2 perform work-related activities.” SSR 16-3p, at *2.

3 First, the ALJ found that the clinical findings are inconsistent with Plaintiff’s
4 allegations. Tr. 655. An ALJ may not discredit a claimant’s pain testimony and
5 deny benefits solely because the degree of pain alleged is not supported by objective
6 medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell*
7 *v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601. However,
8 the medical evidence is a relevant factor in determining the severity of a claimant’s
9 pain and its disabling effects. *Rollins*, 261 F.3d at 857. Minimal objective evidence
10 is a factor which may be relied upon in discrediting a claimant’s testimony, although
11 it may not be the only factor. *See Burch*, 400 F.3d at 680. Furthermore,
12 contradiction with the medical record is a sufficient basis for rejecting the claimant’s
13 subjective testimony. *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155,
14 1161 (9th Cir. 2008); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995).

15 The ALJ found that the clinical findings, particularly repeated normal range of
16 motion findings, normal ability to heel/toe walk without difficulty, normal upper and
17 lower extremity strength, normal sensation, and normal grip, all of which were noted
18 by the ALJ in detail, are inconsistent with Plaintiff’s allegations of an inability to
19 stand in one place for over five minutes, walk 15 minutes at a time and needing to
20 immediately lie down, and needing to lie down five to six times per day for at least a
21 half hour at a time. Tr. 655. The ALJ also found the clinical findings are

1 inconsistent with allegations of an inability to grip things, hold items, or write and
2 needing to have someone “pry open” his fingers. Tr. 655.

3 Plaintiff asserts the ALJ “offered little more than vague assertions that the
4 claimant’s allegations are unsupported by the objective medical evidence,” ECF No.
5 9 at 23 (citing *Robbins*, 466 F.3d 880), but Plaintiff does not address the ALJ’s
6 specific findings. Plaintiff also asserts the ALJ “failed to account” for
7 electrodiagnostic studies and decreased strength in Plaintiff’s upper extremities.
8 ECF No. 9 at 23 (citing Tr. 497, 499, 504-05). However, as noted *supra*, the ALJ
9 considered the electrodiagnostic studies in the record and acknowledged records of
10 decreased grip strength in April, May, and August 2019 (Tr. 497, 499, 504) cited by
11 Plaintiff, but also noted that Plaintiff made good gains in grip strength with physical
12 therapy, Tr. 640, and that in February 2020, his grip strength was normal. Tr. 589.
13 Additionally, the ALJ noted instances of normal 5/5 grip strength on exam in
14 February, August, and September 2020 and in January 2021. Tr. 656 (citing Tr. 608,
15 1032, 1065, 1118). The ALJ reasonably considered the electrodiagnostic studies and
16 evidence of reduced grip strength.

17 Plaintiff further argues the ALJ “failed to account” for objective evidence of
18 radiculopathy in the form of electrodiagnostic studies. ECF No. 9 at 17. This is
19 incorrect, as the ALJ considered the February 17, 2021, nerve conduction study
20 which showed ulnar mononeuropathy across the left elbow and right medium
21 mononeuropathy. Tr. 656. Based on those findings, as well as other objective

1 findings discussed in detail by the ALJ, the ALJ included an additional limitation in
2 the RFC of no repetitive, forceful grasping. Tr. 656. Plaintiff has not acknowledged
3 or specifically challenged the ALJ's discussion of the evidence. The ALJ's
4 consideration of the clinical findings in the record was reasonable and based on
5 substantial evidence.

6 Second, the ALJ found that Plaintiff's daily activities are consistent with the
7 RFC finding. Tr. 657. It is reasonable for an ALJ to consider a claimant's activities
8 which undermine claims of totally disabling pain in evaluating symptom claims. *See*
9 *Rollins*, 261 F.3d at 857. "Even where [Plaintiff's daily] activities suggest some
10 difficulty functioning, they may be grounds for discrediting the claimant's testimony
11 to the extent that they contradict claims of a totally debilitating impairment."
12 *Molina*, 674 F.3d at 1113. The ALJ noted that Plaintiff was able to ride his
13 motorcycle, including riding a new motorcycle 160 miles over a weekend in
14 February 2021, which the ALJ found is inconsistent with greater sitting or gripping
15 and handling limitations. Tr. 657 (citing Tr. 1183, 1384, 1420). The ALJ also
16 observed that Plaintiff is independent with shopping, chores, and hygiene, which
17 does not support additional exertional or postural limitations. Tr. 657.

18 Plaintiff argues generally that the ALJ erred by "overstating the claimant's
19 activities and failing to identify any inconsistency with her [sic] disabling
20 allegations." ECF No. 9 at 17. Plaintiff also argues that the ALJ improperly
21 considered his testimony about hiking and child care activities. ECF No. 9 at 18.

1 Although Plaintiff does not cite the ALJ's decision, Plaintiff is apparently
2 referencing the previously vacated 2020 decision, wherein the ALJ discussed those
3 daily activities, as the current decision does not mention hiking or child care in this
4 context.⁵ Tr. 23-24, 657. As such, the argument is moot. Plaintiff does not address
5 the daily activities mentioned by the ALJ in the current decision. The ALJ
6 reasonably found that Plaintiff's ability to ride a motorcycles 160 miles over a
7 weekend is inconsistent with Plaintiff's allegations of disabling sitting, gripping, and
8 handling limitations, to the extent they exceed the limitations in the RFC finding.
9 The ALJ's conclusion is supported by substantial evidence, and this is a clear and
10 convincing reason.

11 Plaintiff also contends the ALJ failed to address his allegations of napping
12 multiple times per day or the need to lie down for half a day three to four days per

13 _____
14 ⁵ Plaintiff also argues the ALJ improperly stated that Plaintiff's conservative
15 treatment is inconsistent with his symptom testimony. ECF No. 9 at 18-19. As with
16 Plaintiff's argument regarding his hiking and child care activities, the argument is
17 moot. The ALJ in the current decision did not cite Plaintiff's conservative treatment
18 as inconsistent with his allegations, although Plaintiff's course of treatment was
19 noted. Tr. 655. Presumably, Plaintiff is responding to the ALJ's prior decision
20 which did mention conservative treatment, Tr. 24, but that decision was vacated
21 after the previous remand.

1 week. ECF No. 9 at 20. However, the ALJ acknowledged Plaintiff's allegations
2 that he needs to lie down often, Tr. 653, but as discussed *supra*, the ALJ concluded
3 the clinical findings do not support the need to lie down five to six times per day for
4 a half hour at a time. Tr. 655. Furthermore, it is noted that no provider assessed any
5 limitations related to the need to lie down. Tr. 657-61. The ALJ did not err in this
6 regard.

7 **D. Prior Court Order**

8 Plaintiff asserts the ALJ failed to follow the previous order of this Court and
9 the Appeals Council. ECF No. 9 at 20-21. This argument has no merit. The prior
10 order of this Court was based on the stipulation of the parties. Tr. 747-49.

11 Plaintiff's assertion that the ALJ was instructed to "reconsider whether the claimant
12 could maintain competitive employment despite a restriction to occasional handling
13 since February 2019" is not supported by anything contained in this Court's prior
14 order. Tr. 747-49.

15 The Appeals Council's remand order addressed the ALJ's assessment that
16 beginning in February 2019, Plaintiff's RFC changed to include manipulative
17 limitations. Tr. 779. The AC determined the ALJ's rationale for this finding was
18 inadequate because specific evidence supporting a limitation to occasional reaching
19 and handling was not identified. Tr. 779. The ALJ was instructed to "[g]ive further
20 consideration to the claimant's maximum residual functional capacity during the
21 entire period at issue and provide rationale with specific references to evidence of

1 record in support of assessed limitations” and the prior decision was vacated. Tr.
2 778-79. The Appeals Council did not find that Plaintiff is limited to occasional
3 reaching and handling; rather, the Appeals Council directed the ALJ to reconsider
4 the RFC finding and ensure that it is supported by references to evidence in the
5 record.

6 As discussed throughout this decision, the ALJ did exactly that, which
7 resulted in a limitation of no repetitive, forceful grasping rather than occasional
8 handling and reaching. The limitation of no repetitive, forceful grasping is
9 supported by references to the record. Tr. 656-57. It is noted that despite arguing
10 that the ALJ erred by failing to include a limitation to occasional reaching and
11 handling in this decision, Plaintiff has not identified any specific evidence in the
12 record supporting that particular limitation. The ALJ did not err in carrying out the
13 prior order of this Court or the Appeals Council.

14 **E. Steps Four and Five**

15 Plaintiff contends that the ALJ erred by “creating a new term” in the RFC
16 finding. ECF No. 9 at 21. The RFC finding includes a limitation to “no repetitive,
17 forceful grasping” after February 17, 2021. Tr. 652. Without providing citations,
18 Plaintiff argues that the DOT refers to “handling, fingering, and feeling” and that
19 the regulations refer to “handling,” suggesting that the limitation to “no repetitive,
20 forceful grasping” is not an appropriate limitation. ECF No. 9 at 21. However,
21 Plaintiff points to no authority requiring that the RFC contain only terms defined

1 by the Dictionary of Occupational Titles or the regulations. In fact, it is the ALJ's
2 responsibility to provide an interpretation of the facts and conflicting clinical
3 evidence and make an RFC finding based on that interpretation. *Tommasetti v.*
4 *Astrue*, 533 F.3d 1035, 1041 (9th Cir.2008). Furthermore, numerous district court
5 cases have acknowledged a limitation regarding forceful grasping. *See e.g., Absari*
6 *v. Berryhill*, No. SACV 17-00665-JEM, 2018 WL 1870408, at *5 (C.D. Cal. Apr.
7 17, 2018); *Robles v. Colvin*, No. 1:14-CV-00285-SMS, 2014 WL 7447764, at *7
8 (E.D. Cal. Dec. 31, 2014) (collecting cases).

9 In this case, the ALJ provided a detailed review of the clinical findings and
10 opinion evidence in formulating Plaintiff's RFC. Tr. 652-61. The ALJ specifically
11 discussed the evidence supporting the grasping limitation, which was "designed to
12 avoid exacerbating the claimant's hand pain and numbness." Tr. 656-57 (citing Tr.
13 1055, 1405, 1699). The vocational expert considered the vocational impact of "no
14 repetitive, forceful grasping" and concluded that there are jobs an individual with
15 that limitation and others assessed by the ALJ can do. Tr. 694-95. Thus, Plaintiff
16 has not established any error.

17 Plaintiff further argues the ALJ erred at steps four and five because the
18 vocational expert's opinion was based on an incomplete hypothetical. ECF No. 9 at
19 21. The ALJ's hypothetical must be based on medical assumptions supported by
20 substantial evidence in the record which reflect all of a claimant's limitations.
21 *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should

1 be “accurate, detailed, and supported by the medical record.” *Tackett*, 180 F.3d at
2 1101. The ALJ is not bound to accept as true the restrictions presented in a
3 hypothetical question propounded by a claimant’s counsel. *Osenbrook*, 240 F.3d at
4 1164; *Magallanes v. Bowen*, 881 F.2d 747, 756-57 (9th Cir. 1989); *Martinez v.*
5 *Heckler*, 807 F.2d 771, 773 (9th Cir. 1986). The ALJ is free to accept or reject these
6 restrictions as long as they are supported by substantial evidence, even when there is
7 conflicting medical evidence. *Magallanes*, 881 F.2d at *id.*

8 Plaintiff’s argument assumes that the ALJ improperly rejected limitations of
9 occasional handling and gripping and the need to lie down multiple times per day.⁶
10 ECF No. 9 at 21. The ALJ’s reasons for rejecting those limitations were, as
11 discussed throughout this decision, legally sufficient and supported by substantial
12 evidence. The ALJ therefore properly excluded additional limitations from the RFC
13 and hypothetical to the vocational expert. The hypothetical contained the limitations
14 the ALJ found credible and supported by substantial evidence in the record. The
15 ALJ’s reliance on testimony the VE gave in response to the hypothetical was

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18 ⁶ Plaintiff mentions in passing an allegation of being off task more than 10% of the
19 time. ECF No. 9 at 21. The Court does not consider matters on appeal that are not
20 specifically and distinctly argued. *See Carmickle v. Comm’r Soc. Sec. Admin.*, 533
21 F.3d 1155, 1161 n.2 (9th Cir. 2008).

1 therefore proper. *See id.*; *Bayliss v. Barnhart*, 427 F. 3d 1211, 1217-18 (9th Cir.
2 2005).

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, this Court concludes the
5 ALJ's decision is supported by substantial evidence and free of harmful legal error.

6 Accordingly,

7 1. Plaintiff's Brief, **ECF No. 9**, is **DENIED**.

8 2. Defendant's Brief, **ECF No. 11**, is **GRANTED**.

9 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order
10 and provide copies to counsel. Judgment shall be entered for Defendant and the file
11 shall be **CLOSED**.

12 **DATED** December 4, 2024.

13 

14 LONNY R. SUKO

15 Senior United States District Judge
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